

**MINUTES OF  
ADVISORY COMMITTEE ON RULES OF EVIDENCE**

Friday, January 31, 2014

Arizona Courts Building

1501 W. Washington, Conference Room 230

Web Site: <http://www.azcourts.gov/rules/AdvisoryCommitteeonRulesofEvidence.aspx>

**Members Present:**

The Honorable Samuel Thumma, Co- Chair  
The Honorable Mark Armstrong (Ret.), Co-  
Chair  
Mr. Paul Ahler (via telephone)  
The Honorable George Anagnost (via  
telephone)  
Professor Dave Cole  
Mr. Timothy Eckstein  
The Honorable Pamela Gates  
Mr. Milton Hathaway  
Ms. Shirley McAuliffe  
The Honorable Michael Miller (via  
telephone)  
Ms. Patricia Refo

**Members Not Present:**

The Honorable Paul Julien  
Mr. William Klain  
Mr. Carl Piccarreta  
The Honorable James Soto

**Quorum:**

Yes

### **1. Call to Order—Judge Thumma**

Judge Thumma called the meeting to order at 10:05 a.m., welcomed members, and wished them a Happy New Year.

### **2. Approval of Minutes from Meeting of October 18, 2013—Judge Thumma**

The minutes were approved by acclamation. Judge Miller stated his appreciation for the completeness of the October minutes, which allowed him to keep up with committee business even though he was unable to attend that meeting. He also thought the minutes would be helpful in the future for individuals attempting to ascertain why the committee did what it did.

### **3. Future Meeting Schedule—Judge Thumma**

Judge Thumma went over the proposed meeting schedule for the remainder of the year (April 11, September 12 and December 12). Trish Refo advised the committee that the ABA Section on Litigation will be meeting on April 11, and thus she has a conflict on that date. Judge Thumma reported that he would also be attending that section meeting. Judge Armstrong will attempt to reschedule the April meeting.

### **4. R-14-0002—Petition to Amend Rules 801(d)(1)(B) and 803(6)-(8)—Judges Thumma and Armstrong**

On January 9, 2014, Judges Armstrong and Thumma, on behalf of the committee, filed a petition to amend Rules 801(d)(1)(B) and 803(6)-(8). The petition has been opened for a comment period ending May 20, 2014. If the Arizona Supreme Court adopts the proposed rule changes at its August Rules Agenda, the changes will become effective January 1, 2015.

Judge Armstrong summarized the proposed amendments and noted a typographical error on the third line of the third paragraph of the proposed Comment to 2015 Amendment to Rule 801(d)(1)(B) (the second “of” should be “or”). He also observed that the reference to “conflict in the cases” in the second paragraph of the same comment referred to federal cases. Judge Armstrong asked the committee to consider whether this reference should be clarified. Trish Refo pointed out that a conflict also existed in some other states. The committee agreed that the reference should be clarified by changing “conflict in the cases” to “conflict in federal cases and cases from other jurisdictions,” or words to that effect. Judge Armstrong stated he would recommend these changes in his ultimate recommendations to the Court on this petition.

Judge Armstrong further reported that the comparable federal rule change proposal has been approved by the Judicial Conference and is pending before the United States Supreme Court. If the proposed federal amendments are approved by the Court, as expected, and Congress does not act to defer, modify or reject them, they will become effective December 1, 2014.

### **5. Ariz. R. Evid. 615 and 611(a)—Judge Thumma, Bill Klain and All**

This agenda item was again deferred. The minutes from the October meeting regarding that agenda item states:

The committee decided to defer this issue pending the results of the federal technology symposium held October 11, 2013, and the next edition of the civil and criminal benchbook, which may include a revised admonition. Ms. Refo volunteered to contact Professor Dan Capra, reporter to the federal Advisory Committee on Evidence Rules, to ascertain the results of the symposium.

#### **6. Report of Subcommittee on California Evidence Code § 1109—Judge Julien and All**

Subcommittee members Tim Eckstein and Paul Ahler summarized the California code provision and reported that the subcommittee had scheduled a meeting with Judge Suzanne Cohen to further discuss this issue but the meeting had to be cancelled and rescheduled. Mr. Ahler has discussed the issue with APAAC. Trish Refo offered the assistance of Snell & Wilmer's California office to do any research requested by the subcommittee. Judge Miller asked whether any other states had adopted a similar rule, and Mr. Eckstein stated his understanding that California is the only state with such a rule. Otherwise, this issue was deferred pending the meeting with Judge Cohen and further subcommittee discussion.

#### **7. Report of Subcommittee on Varying Evidentiary Standards in Subject-Matter Rules—Judge Thumma and All**

Judge Thumma reported on behalf of the subcommittee, stating that there is no formal report at this time. To follow up on an August 28, 2013 memorandum circulated to the committee previously, Judge Thumma advised that he has edited his August 28, 2013 memorandum, and prepared a new draft memorandum, which is still being considered by the subcommittee and thus is not ready for committee consideration. The subcommittee has discussed whether there is merit in attempting to develop a uniform evidentiary standard for limited jurisdiction courts for use when no specific standard is provided, or otherwise. Judge Thumma observed that the Arizona Rules of Protective Order Procedure are the only set of rules generally applicable in both general and limited jurisdiction courts. The committee discussed some of varying evidentiary standards in different contexts.

Judge Thumma referred to a recent e-mail message he sent to subcommittee members and Judge Armstrong, in which he suggested that rule sets could be categorized as falling into three buckets, as follows:

1. Rule sets that apply the ARE as written or as modified to account for specific issues unique to the rule sets. The most clear of these are Arizona's procedural rules for civil, criminal, juvenile, tax and eviction matters in superior court and also justice court matters. If this is a proper "bucket," there would be nothing to do on these rule sets, other than to see if they need to be "restyled" in very limited part to conform to the restyled ARE or, possibly, to consider whether there is merit in seeing if the justice court matters should properly be in a different "bucket."

2. Rule sets that adopt the relaxed Family Court standard, which appear to be Arizona's procedural rules for family, probate and protective order matters. If this is a proper "bucket," there may be merit in seeing if the same standard (as opposed to three similar but different standards) could be arrived upon for these rule sets.

3. A non-ARE standard that is even more relaxed than the relaxed Family Court standard that could apply broadly when there is no evidentiary standard specified (and, if a particularly helpful standard was identified, could be adopted more broadly). If this is a proper "bucket," it would require real work to try to develop a standard that pro se parties and non-law trained individuals generally could easily and fairly understand and apply. A starting point might be the small claims concept, where "any evidence deemed material, relevant and competent may be admitted." A.R.S. 22-516(A). The simplicity of such an approach may have merit, as may the use of the word "relevant," which is widely used for evidentiary issues. The words "material" and "competent," on the other hand, have caused significant issues in the law of evidence and their meaning has been debated without crisp answers. Judge Thumma concluded that "If we are intending to make the standard easy for folks who are not lawyers to apply, I'd want something easier to understand and apply but that still was fair to all and had meaning."

Judge Anagnost concurred with Judge Thumma's summary and suggested the subcommittee or committee might be interested in the observations of other judges. The subcommittee will continue to discuss this issue.

## **8. Other Items for Discussion—Judges Armstrong and Thumma**

Judge Thumma congratulated Trish Refo on her expected election as chair of the ABA House of Delegates (two-year term commencing August 2014). Committee members added their congratulations. Judge Thumma also noted Judge Soto's confirmation hearing for the United States District Court for the District of Arizona took place earlier in the week and that the nominee presented himself exceptionally well. Judge Thumma also stated he anticipated that committee members would be making evidence-related presentations at the State Bar Convention and Arizona Judicial Conference.

Judge Armstrong reported that there has been no new activity on the federal front except that the Standing Committee on Rules of Practice and Procedure met January 9 in Phoenix concerning proposed changes to the Federal Rules of Civil Procedure. The transcript of the public portion of the meeting is available at the United States Courts website.

Trish Refo reminded the committee that the federal Advisory Committee on Evidence Rules may at some point take up the potential need for an amendment of Rule 803(16), the hearsay exception for ancient documents (documents "at least 20 years old"), in light of the proliferation of electronically stored information ("ESI").

## **9. Call to the Public/Adjournment—Judge Thumma**

Judge Thumma made a call to the public. No members of the public were present.

Following the call to the public, Judge Thumma adjourned the meeting at approximately 11:00 a.m.